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Explanatory note to the draft convention on the suppression of acts of nuclear terrorism (A/AC.252/L.13) submitted by the Russian Federation*

I. INTRODUCTION

1. Since nuclear technologies were developed, the world community has more than once encountered cases of "leakage" of nuclear components. There are familiar instances in which private individuals and groups proclaimed their intention of using the nuclear potential allegedly in their possession for terrorist and criminal purposes.

2. The object of terrorist attacks is normally to achieve an "immediate dramatic impact", and this can best be done by using weapons of mass destruction or radioactive material. Thus, an attack on a nuclear power plant by a group of lightly armed terrorists or a statement of intention to use a nuclear weapon or nuclear materials may ultimately not even cause any real damage, but the psychological impact, hysteria and fear may be enormous, and terrorists find this particularly attractive.

3. Accordingly, it is important to take pre-emptive measures, to establish a reliable international legal mechanism for countering acts of nuclear terrorism, which can create a real threat to people's lives and undermine international peace and security. The need for a new international legal instrument arises from the fact that the 1980 Convention on the Physical Protection of Nuclear Material has a number of substantial gaps as regards countering acts of terrorism involving the use of nuclear weapons or materials (above all at the stage of stopping the terrorist act and eliminating its consequences).

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* In a letter dated 9 January 1997 addressed to the Secretary-General by the Permanent Representative of the Russian Federation to the United Nations.

4. Basically, the 1980 Convention applies to the safety of the "peaceful atom", and in our view covers only one narrow area of the machinery for combating the criminal use of nuclear material, namely preventing nuclear components from getting out of the possession of State bodies. Obviously, this instrument alone is insufficient to eliminate the danger of nuclear terrorism in all its manifestations.

5. It was for these reasons that the Russian Federation submitted to the United Nations the draft Convention on the Suppression of Acts of Nuclear Terrorism. In submitting it, we see our task as being to increase the attention paid by the world community to combating new and dangerous manifestations of terrorism, to stimulate the adoption of effective preventive measures in this sphere, and to establish a reliable international legal mechanism for cooperation at all stages of combating nuclear terrorism (prevention, suppression, investigation, bringing to trial of those responsible, dealing with the consequences of an incident of nuclear terrorism). Accordingly, we are ready to give constructive consideration to any proposals by other States designed to strengthen the provisions of the Russian draft.

6. The Russian draft Convention does not contain any norms which go beyond the traditional framework of legal cooperation in combating terrorism. In essence, it is based on the approach taken by anti-terrorist conventions (the principle of universal jurisdiction, the aut dedere, aut judicare formula, and so on). A number of articles in the draft reproduce word for word the corresponding formulations in the anti-terrorist conventions already approved by the international community, and also in the 1980 Convention.

II. ARTICLE-BY-ARTICLE COMMENTARY

Preamble

7. The preamble of the draft briefly sets forth the aims and objectives of the Convention.

8. The fourth preambular paragraph, which contains a reference to the Declaration on Measures to Eliminate International Terrorism, could be supplemented by a reference to General Assembly resolution 51/210 of 17 January 1997. That resolution not only approved a Declaration to Supplement the 1994 Declaration, but also established an Ad Hoc Committee to consider, inter alia, the draft Convention on nuclear terrorism (para. 9 of the resolution).

Article 1

9. The article contains definitions of the main terms used in the Convention. It does not form part of the aim of the Convention to establish a unified terminology (including the corpus delicti) which would be transferred unchanged into the national legislation of States parties. Rather, what is provided is a conceptual apparatus intended to ensure the effective implementation of the

provisions of the treaty. For this reason, article 1 begins with the words "For the purposes of this Convention".

10. Article 1, paragraph 1, contains a definition of "An act of nuclear terrorism".

11. In drawing up the definition, use was made of the methodology for preparing definitions of acts punishable under criminal law which is typically used in the existing universal anti-terrorism conventions, and also of the relevant proposals of scholars and practitioners.

12. The definition attempts to cover to the broadest extent the possible instances of illegal acts which may be categorized as acts of nuclear terrorism.

13. The main distinctive feature of the definition (as distinct from the crimes specified in article 7 of the Convention on the Physical Protection of Nuclear Material of 1980) is the indication of the purpose of the acts listed, which is an inseparable element of the corpus delicti setting an act of nuclear terrorism apart from other actions involving the use of nuclear components.

14. Incidentally, the definition specifically does not single out political motivation as a constituent element of terrorist actions. As a study of this subject prepared by the Secretariat in 1972 (A/C.6/418), states: "It is now found that quite similar acts, spreading similar terror or alarm among the population, are done for ordinary criminal motives, such as extortion of large sums ... From the standpoint of the effect on the innocent, there is no reason to limit international discussion to terrorist acts with political aims, while leaving aside very similar acts with ordinary criminal aims."

15. The main distinctions between the definition of an act of nuclear terrorism given in the draft and the crimes specified in article 7 of the 1980 Convention may be summarized as follows:

(a) As already noted, the crimes under the 1980 Convention contain no indication of the terrorist purpose of the acts (the emphasis is placed on their consequences, not on the accompanying motivation and intent);

(b) The 1980 Convention does not regulate attempts on facilities which pose an accentuated threat because of their use of nuclear material (nuclear power stations, nuclear-powered ships, etc.);

(c) The scope of the 1980 Convention is extremely narrow for the effective suppression of terrorism (according to article 2, paragraph 1, "This Convention shall apply to nuclear material used for peaceful purposes while in international transport").

The Russian draft proposes to establish an international legal regime of inevitability of criminal responsibility, including for attempts on facilities and materials whose purpose and use is military;

(d) The 1980 Convention regulates responsibility only in respect of illegal actions involving nuclear material, as defined in article 1,

subparagraphs (a) and (b), of the Convention. The Russian draft attempts to extend the treaty mechanism to the broadest possible range of facilities, devices and materials possessing properties that pose the potential danger of a nuclear impact (nuclear fuel, radioactive wastes, nuclear facilities and reactors, nuclear explosive devices, including homemade ones, and so on);

(e) Lastly, the Russian draft proposes that not only the attempt to commit and complicity in the acts listed (as provided for in the 1980 Convention), but also preparing to commit them (article 1, paragraph 1 (c)) should be recognized as punishable under criminal law.

16. Unlike article 7 of the 1980 Convention, the Russian draft does not make use of the concept of mens rea in defining the corpus delicti, since the direct indication of the purpose of the actions excludes the possibility of their being committed through carelessness or in accordance with the concept of dolus eventualis.

17. Article 1, paragraph 2. The definition of "nuclear material" is taken word for word from article 1 (a) (b) of the Convention on the Physical Protection of Nuclear Material of 1980.

18. Article 1, paragraph 3. The definition of "nuclear fuel" is taken word for word from article 1, paragraph 1 (f), of the Vienna Convention on civil liability for nuclear damage of 1963.

19. Article 1, paragraphs 4 and 5. In drafting the definitions of "radioactive products" and "radioactive wastes", use was made of the corresponding definitions in article 1, paragraph 1 (g) of the above-mentioned Vienna Convention of 1963, and also of article 1, paragraph (a) (iv) of the Paris Convention on third party liability in the field of nuclear energy of 1960.

20. Article 1, paragraph 6. The purpose of this provision is to cover any other radioactive substances (having clearly expressed hazardous properties) which do not fall under the definition of "nuclear material", "nuclear fuel" or "radioactive products and wastes". The term "nuclear substances" is used in the above-mentioned Paris Convention of 1960 (particularly in article 1, paragraph (a) (v)).

21. Article 1, paragraph 7. In drafting the definition of "a nuclear installation", use was made of the corresponding definition contained in article 1, paragraph 1 (j) of the 1963 Vienna Convention. In distinction from the Vienna Convention, it was felt desirable to include within the scope of the Convention on nuclear terrorism, as a possible subject of an attempt or instrumentalis crimen, nuclear reactors that may be installed on vessels, aircraft or space objects.

22. Article 1, paragraphs 8 and 9. The definitions of "a nuclear explosive device" and "a radiation-dissemination device" given in these paragraphs are not found in the universal international treaties. As these terms are used in the definition of an active nuclear terrorism, it is advisable to define them concretely in order to avoid an excessively broad interpretation.

Article 2

23. Article 2, paragraph 1. This provision is of key significance. Issues belonging to another sphere of international law, including the conduct of States in war and peace, the non-proliferation of nuclear weapons, the lawfulness of the use and possession of nuclear weapons by subjects of international law, etc., are deliberately excluded from the scope of the Convention.

24. Article 2, paragraph 2 contains the standard formulation granting immunity under international law to vessels and aircraft belonging to a State and operated by it for military, customs or police purposes (similar provisions are found, in particular, in the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft of 1963 (article 1, paragraph 4), the Hague Convention for the Suppression of Unlawful Seizure of Aircraft of 1970 (article 3, paragraph 2), the Montreal Convention on the Suppression of Unlawful Acts Against the Safety of Civil Aviation of 1971 (article 4, paragraph 1) and the Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation of 1988 (article 2)).

25. As regards space objects, the provision in question places them in a separate category, since space objects have a sui generis absolute immunity, as distinct from the functional immunity of vessels and aircraft.

26. Pursuant to article VIII of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and other Celestial Bodies, of 1967, "a State Party to the Treaty on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object, and over any personnel thereof, while in outer space or on a celestial body".

27. Thus the 1967 outer space treaty unambiguously links the existence of jurisdiction and control with the act of registration of the space object, assigning to registration, in the absence of an agreement to the contrary, predominance over other possible grounds (for example, nationality of the crew, ownership of the object, place of launch, etc.)

Article 3

28. Article 3 makes provision for the rule approved in the universal anti-terrorist conventions (see, inter alia, mutatis mutandis, the wording of article 7, paragraph 2, of the Convention on the Physical Protection of Nuclear Material of 1980) regarding the obligation to criminalize in national legislation the actions set forth in the international treaty.

Article 4

29. The most important area of cooperation is the preventive measures taken by States, inter alia, to prevent the conduct in their respective territories of preparatory and organizational activity for the purpose of committing terrorist

acts directed against other States and their nationals (article 4, paragraph 1, of the draft); to exchange information and coordinate the necessary measures (article 4, paragraph 2, of the draft); and lastly to adopt measures for the physical protection of nuclear materials, facilities, etc. (article 4, paragraph 3, of the draft).

30. The wording of paragraphs 1 and 2 is to be found in practically all the anti-terrorist conventions, while paragraph 3 has the purpose of reaffirming and expanding in a general form the obligations provided for in the 1980 Convention.

Article 5

31. Article 5, paragraph 1 of the draft Convention provides that a State party is obliged to establish its jurisdiction over the offences referred to in article 1, paragraph 1, of the draft Convention in the following cases, which are well known in international law:

(a) Territorial jurisdiction (if the crime is committed in its territory, or on board a vessel or aircraft, or a space object, registered in the State in question);

(b) Personal jurisdiction/nationality or active personality/(if the crime is committed by a national of the State in question, regardless of where it is committed);

(c) Protective jurisdiction (in the case of commission of a crime directed against the State itself in order to compel that State to perform or refrain from performing some action).

32. The State may establish jurisdiction (i.e., it has optional jurisdiction) in the event of:

(a) Passive personal jurisdiction/passive personality/(when a crime is committed in respect of or against the State in question or a legal person connected with that State);[1]

(b) If the crime was committed outside its territory by a stateless person having his or her habitual residence in the State.

33. Article 5, paragraphs 2 and 3. These provisions are found in practically all the anti-terrorists conventions (for example, article 6, paragraphs 4 and 5, of the Rome Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 1988, article 8, paragraphs 2 and 3, of the Convention on the Physical Protection of Nuclear Material of 1980, and others).

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[1] The term "in respect of" means that an individual or legal person who was not the object of the terrorist attempt became a victim of it as a result of circumstances. The term "against" means that the individual or legal person was the direct object of the terrorist attempt.

Article 6

34. The article provides for rules imposing on States obligations with respect to the effective suppression of terrorist acts. The Convention on the Physical Protection of Nuclear Material of 1980 contains no similar rules (in other words, the 1980 Convention does not regulate the stage of suppression of a crime that has begun and is continuing).

35. Under the terms of article 6, paragraph 1, of the draft, a State party in the territory of which a nuclear offence is committed or in the territory of which an alleged offender is present shall take all measures, including coercive measures, to suppress that crime. Naturally, such measures (and this is directly specified in the draft) must take place within the framework of international law.

36. Article 6, paragraph 3, of the draft is of great significance. With the consent or in accordance with a request for assistance from the State concerned, any State party (not only the State which may have jurisdiction) is given the opportunity of taking measures to suppress an act of nuclear terrorism in the territory of another State, including coercive measures. This is particularly important, in that only States which possess nuclear weapons and/or have a developed nuclear power industry as a rule possess the necessary experienced staff and material, technical and other potential to enable them to resolve a crisis situation with the least damage.

Articles 7, 8 and 9

37. These articles contain the standard formulations relating to regulation of the aut dedere, aut judicare mechanism, the provision of legal assistance in connection with an ongoing trial, guarantees of the rights of the suspect (the accused) and action for extradition.

38. Similar rules are to be found in all the anti-terrorist conventions, including the 1980 Convention (articles 10-13).

Article 10

39. Article 10 regulates cooperation among States at the stage following settlement of an incident of nuclear terrorism, primarily in matters relating to return of the nuclear components used in the commission of the act of terrorism.

40. The Convention on the Physical Protection of Nuclear Material of 1980 contains (predominately in article 5) a number of provisions relating to the return of nuclear material in the event of its "theft, robbery or any other unlawful taking". However, article 5, paragraph 2, of the 1980 Convention is open to the interpretation that such return takes place:

(a) Firstly, in accordance with the national legislation of the returning State;

(b) Secondly, to any State which requests return; and

(c) Thirdly, "as appropriate".

41. In distinction from the 1980 Convention, article 10, paragraph 1, of the draft embodies a rule in accordance with which upon the completion of the incident all the nuclear components used in the commission of the terrorist act must be returned to the State party:

(a) To which they belong; or

(b) Which was the State of their origin.

42. This is a sui generis additional element in the machinery for the non-proliferation of nuclear weapons, although the Convention itself does not deal with these issues. A State party which by chance (or perhaps as a result of deliberate action) has a nuclear weapon or nuclear materials in its possession as a result of an act of nuclear terrorism will bear responsibility under international law for non-fulfilment of the obligation to return the weapon or materials in question.

43. In the original Russian of the draft convention, this rule is unconditional and imperative in nature. The words in article 10, paragraph 1, "если это представляется возможным (if possible)" [shall be returned] specifically relate only to the case in which the nuclear material cannot be returned because it has been totally destroyed. The translation, particularly into English, allows this proviso to be interpreted as "shall be returned, if this is considered convenient", which substantially changes what the authors of the draft had in mind.

44. Article 10, paragraph 2, provides for separate consultations between the States concerned regarding the subsequent use of nuclear components used in the commission of an act of nuclear terrorism if it is not possible to determine their State of origin or the State to which they belong.

45. Although this provision is formulated in general terms, it may be taken that it will also serve as an impediment to the arbitrary and unilateral "appropriation" of nuclear materials located in the territory of any given State.

Article 11

46. In distinction from the Convention on the Physical Protection of Nuclear Material of 1980, and also from the other universal anti-terrorist treaties, article 11 of the draft contains a fairly detailed regulation of cooperation among States in the exchange of relevant information, including the preservation of its confidentiality.

47. Pursuant to article 11, paragraph 3, the obligation to exchange information does not extend to cases in which the provision of such information would be in breach of the domestic legislation of the transmitting side or would jeopardize

the security of the State concerned or the physical protection of nuclear material, weapons, etc. In view of the importance of maintaining a regime of secrecy, and also the delicacy of the issues associated with the protection of information on weapons and materials of mass destruction, this provision is vitally necessary.

48. Bearing in mind also that laws and rules in force in States to govern the protection of nuclear facilities from terrorist attempts may themselves be secret in nature, it was felt desirable not to include in the draft a rule (as in art. 14, para. 1 of the 1980 Convention) on the obligation of each State party to inform the depositary of its laws and regulations relating to the subject matter of the Convention.

49. For purposes of the effective exchange of information, article 11, paragraph 4, provides for an obligation on the part of States parties to inform one another about their competent authorities and liaison points responsible for sending and receiving the information. It is assumed that this provision will not pose serious difficulties for States (a similar rule, for example, is contained in article 5, paragraph 1 of the 1980 Convention on the Physical Protection of Nuclear Material).

Article 12

50. The provision in this article regarding the possibility of consultations between States parties being conducted through mutual agreement is self-evident and requires no commentary.

Article 13

51. The indication that the obligations of States under the Convention do not affect the obligations under other international treaties is traditional treaty practice.

Article 14, paragraph 52

52. An essential element in cooperation to counter international terrorism is the principle of peaceful settlement of disputes arising between the contracting parties with respect to the interpretation or application of the relevant conventions.

53. Article 14 of the draft affords the possibility of settling such disputes by negotiation or arbitration or in the International Court of Justice. In accordance with the treaty practice characteristic of multilateral conventions, States parties also have the right to enter a reservation to the effect that they do not consider themselves bound by the procedure of compulsory court and arbitral settlement (article 14, paragraph 3) of the draft.

54. In view of the close interrelationship between the draft Convention on the suppression of acts of nuclear terrorism and the 1980 Convention, article 14 of the draft reproduces word for word the corresponding article (art. 17) of the Convention on the Physical Protection of Nuclear Material.

Articles 15, 16, 17, 18, 19 and 20

55. For the reason indicated above in the commentary on article 14 of the draft, the final provisions are also drawn up on the basis of the relevant articles of the Convention on the Physical Protection of Nuclear Material (articles 18-23).